

Supreme Court, U. S.

FILED

DEC 13 1976

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1976

NO.

**76-802**

**H. GORDON HOWARD, *Appellant***

vs.

**THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO, *Appellee***

**JURISDICTIONAL STATEMENT ON AN APPEAL FROM THE  
THREE-JUDGE PANEL IN CIVIL ACTION NO. 75 M 297 OF THE  
UNITED STATE DISTRICT COURT FOR COLORADO TO THE  
SUPREME COURT OF THE UNITED STATES**

**H. GORDON HOWARD  
Plaintiff and Appellant, Pro Se,  
2470 South Ivanhoe Place  
Holly Hills  
Denver, Colorado 80222**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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NO.

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**H. GORDON HOWARD, Appellant**

vs.

**THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO, Appellee**

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*To the honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

COMES NOW Your Appellant, H. Gordon Howard, PRO SE,  
and files herewith the Jurisdictional Statement required by Rule 15,  
page 10 of the Rules, to wit:

1. Reference is hereby made to the Memorandum and Order of Dismissal of the Three-Judge Panel in Civil Action No. 75 M 297 of the U.S. District Court for Colorado, made, entered and filed in the aforesaid Civil Action on February 19, 1976, which isn't reported officially.

2. The jurisdiction of this Court is hereby invoked pursuant to Title 28, Section 1253, U.S.C.A., on the ground that the dismissal of said action and complaints is, and was, an arbitrary, unreasonable, and capricious abuse of judicial discretion, denying to the appellant herein a hearing on his constitutional rights as a U.S. Citizen, as secured by the 14th Amendment to the Federal Constitution.

3. The proceeding below was to obtain an interlocutory injunction pursuant to Title 28 U.S.C.A., Section 2281.

4. The date of the entry of the Memorandum and Order of Dismissal of the action and complaints, which order is sought to be reviewed herein, was Sept. 28, 1976. The date of the filing of the notice of appeal was October 18, 1976, and it was filed with the U.S. District Court for Colorado.

5. Jurisdiction is conferred upon this Court by Title 28 U.S.C.A., Section 1253.

6. Cases Believed To Sustain The Jurisdiction are, as follows:  
 (1) Staub VS. City of Baxley, 355 U.S. 313, at 322, 78 S.Ct. 277, 2 L.Ed. 2nd 362.

(2) Gold VS Lomenzo, 425 Fed. Reporter 2nd 959

(3) Coleman VS. Miller, 307 U.S. 433, 83 L.Ed.1385, 59 S.C.R. 972.

7. The State Statute claimed to be invalid is found in 1973 Colo. Rev. Stat., Section 12-16-110 (4) and provides:

All licensees who fail to renew their licenses before February 1st of each year succeeding the year of their previous license shall be required to submit to and pass the examination required by this part 1 for original applicants.

8. The First Question presented by the appeal is whether the said Colorado statute is unconstitutional because it grants to an administrative commission discretionary power without designating reasonable objective criteria, or guidelines, in deciding which persons must take examinations for license renewal. The second question presented by this appeal is whether a three-judge panel can deny the granting of an interlocutory injunction in a case where the appellant herein was never given a hearing on his Federal Constitutional rights, and was denied a hearing thereon by both the State Courts, and 3-judge federal panel.

#### 9. CONCISE STATEMENT OF THE CASE:

The court of Appeals of Colorado in Civil Action No. 74-193, H. Gordon Howard Vs. the Real Estate Comm. of Colorado, reversed a Denver District Court case, Civil Action C-42576, without granting the appellant Howard herein a hearing on the Federal Constitutional

Question presented by this appeal herein. The said Court of Appeals of Colo. is a court of limited and inferior jurisdiction, citing Volume 6 of C.R.S. of 1963, Article 4, Title 13, Chapter 101. The said court has no jurisdiction over cases in which the constitutionality of any statute is presented, citing 6 C.R.S. of 1973. Title 13, Article 4, Chapter 102 (b). Neither the aforementioned Colorado District Court decision, or the said Court of Appeals decision are officially reported anywhere.

The appellant herein applied for a Writ of Certiorari to review the said decision of the Colo. Court of Appeals in appellate case No. C-646 of the Supreme Court of Colorado. The Colo. Supreme Court, without making findings, denied the appellant herein a hearing on his U.S. 14th Amendment Constitutional question, as mentioned in paragraph 8, supra. The order of denial is appended to this jurisdictional statement herein, and isn't officially reported. The decision of the 3-judge panel dismissing appellant Howard's complaints and action on the ground that the court of appeals of Colorado gave the said appellant a hearing on the federal issues involved is an absolutely arbitrary, unreasonable, false, confiscatory, discriminative, and capricious abuse of judicial discretion, since the said court of appeals of Colo. had no jurisdiction, or authority, to decide the appellant's Federal Constitutional Question, and said court denied the appellant his Federal Constitutional claim without ever considering it. The subsequent refusal to review the Colo. Court of Appeals Decision by the Supreme Court of Colo. on the presentation of Appellant's Writ of Certiorari prevented the appellant Howard from getting a decision on his Federal Constitutional Rights under the 14th Amendment, as mentioned supra herein. Therefore, the decision of the Federal 3-judge panel to the effect that the review by the Colo. Court of Appeals of appellants constitutional rights was sufficient is arbitrary, capricious, and unreasonable, because the said court of appeals of Colorado had no jurisdiction or power to pass on Constitutional questions, as set forth supra, being a court of limited and inferior jurisdiction to which constitutional questions are outside the scope of its jurisdiction as set forth in 6 C.R.S. of 1973, Title 13, Article 4, Chapter 102 (b).

10. The right of the appellant herein is so substantial as to call for plenary consideration on review, because appellant has the Federal right to attack, and have a hearing on, an invalid state statute which is injurious to his rights and privileges under the 14th



Amendment to the Federal constitution, as provided by Title 28 U.S.C.A., Section 1253, and Title 28 U.S.C.A., Section 2281, as mentioned supra herein.

11. The copy of appellant's notice of appeal showing the date when it was filed October 18, 1976, and the U.S. District Court for the District of Colorado in which it was filed, are appended hereto.

12. Appended to this jurisdictional statement are the following:

(1) APPENDIX A

The Memorandum and Order of Dismissal by the 3-Judge Federal Panel in Civil Action No. 75 M 297 of the U.S. District Court for Colorado, dated and filed Sept. 28, 1976.

(2) APPENDIX B

The Memorandum and Order by U.S. District Judge, Richard P. Matsch, in Civil Action No. 75 M 297, filed and dated Feb. 19, 1976.

(3) APPENDIX C

The notice of appeal in Civil Action No. 75 M 297, filed and dated on about October 18, 1976, appealing the decision of the 3-Judge Panel which was dated Sept. 28, 1976.

(4) APPENDIX D

The Petition for Writ of Certiorari to the Sup. Court of Colo. in Civil Appeal No. C-646 to review the decision of the Colo. Court of Appeals in unreported case No. 74-193 of the Colo. court of Appeals, a court of inferior and limited jurisdiction having no authority to decide any constitutional questions, which is part and parcel of the record in the U.S. District Court files in Civil Action 75 M 297.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Civil Action No. 75 M 297

H. GORDON HOWARD, *Plaintiff*

v.

THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO, *Defendant*

Memorandum and Order

This three judge court was convened to consider the plaintiff's claim that a Colorado Statute concerning the licensing of real estate brokers is facially in violation of the Fourteenth Amendment to the Constitution of the United States. That statute, 1973 C.R.S. S 12-61-110(4) in relevant part provides:

All licensees who fail to renew their licenses before February 1st of each year succeeding the year of their previous license shall be required to file a new application and may be required to submit to and pass the examination required by this part 1 for original applicants.

The contention is that because the statute fails to designate any criteria for the exercise of discretion by the Real Estate Commission, it can act arbitrarily and discriminatorily in deciding which persons must take examinations for a license renewal.

This statute must be considered in the context of the availability of judicial review of agency action. Colorado has the "State Administrative Procedure Act", 1973 C.R.S. SS 24-4-101-107. Under Section 24-4-106 a judicial remedy is provided for persons adversely affected or aggrieved by agency actions. Paragraph (7) of that section establishes the following scope of review:

If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the

procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken

which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

In this case, Mr. Howard filed an action in the nature of mandamus under Colorado Rule of Civil Procedure 106 (a)(2) and the Colorado Court of Appeals reached the conclusion that the Commission did not abuse its discretion in requiring a written examination. That proceeding was comparable to judicial review under Section 24-4-106.

The open access to court consideration and redress of wrongs resulting from the actions of regulatory agencies in Colorado is sufficient protection for the constitutional rights of applicants for real estate licenses. Accordingly, we conclude that there is no constitutional infirmity in this statute. It is, therefore,

ORDERED that the plaintiff's claim for an injunction is dismissed.

DATED: September 28, 1976.

BY THE COURT:

Robert H. McWilliams  
*United States Circuit Judge*

Sherman G. Finesilver  
*United States District Judge*

Richard P. Matsch  
*United States District Judge*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Civil Action No. 75 M 297

H. GORDON HOWARD, *Plaintiff*

V.

THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO, *Defendant*

Order of Dismissal

Upon the determination of the three judge court that the plaintiff's claim for an injunction must be denied and upon the conclusion that this court has no jurisdiction to review the decision of the Colorado Court of Appeals in Howard V. Real Estate Commission of the State of Colorado, 531 P.2d 981 (Colo. App. 1975) and there being no basis for any other claim of relief within the jurisdiction of this court, it is

ORDERED that the complaint, amended complaint and this civil action are dismissed.

DATED: September 28, 1976.

BY THE COURT:

Richard P. Matsch, Judge  
*United States District Court*



## APPENDIX B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Civil Action No. 75 M 297

H. GORDON HOWARD, *Plaintiff*

VS.

THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO,  
ET AL, *Defendant*

Memorandum and Order

This is an action to enjoin the Colorado Real Estate Commission from applying a Colorado statute, 1973 C.R.S. S 12-61-110 (4), concerning the licensing of real estate brokers. The defendants moved to dismiss for lack of a substantial federal question.

Mr. Howard was licensed as a real estate broker in Colorado on March 16, 1951 and his license was renewed annually through 1957. This license was not renewed in 1958 or in any subsequent year. On October 16, 1972, Mr. Howard made a written application to the commission for a real estate broker's license. A hearing was held on the sole question of Mr. Howard's reputation for good and fair dealing. The hearing officer found that the commission had failed to show that the applicant lacked such a reputation and after adopting the hearing officer's findings, the commission determined that Mr. Howard was qualified to take an examination which it required under the subject statute.

H. Gordon Howard then filed an action in the District Court for the City and County of Denver, Colorado, under Rule 106 (a) (2), in the nature of mandamus, to compel the commission to issue him a license without examination. The district Court issued such an order, but that decision was reversed by the Colorado Court of Appeals in *Howard V. Real Estate Commission of the State of Colorado*, 531 P.2d 981, (Colo. App. 1975). The sole basis for reversal was the conclusion that mandamus was inappropriate to

compel the exercise of discretion in a particular way.

The Colorado Court of Appeals did not consider the question which H. Gordon Howard has raised here; whether the Colorado statute is facially invalid under the Fourteenth Amendment to the Constitution of the United States. The relevant part of the statute provides:

C.R.S. of 1963, as amended, Chapter 117-1-8 (d)

All licensees who fail to renew their licenses before February 1st of each year succeeding the year of their previous license, shall be required to file a new application and may be required to submit to and pass the examination required by the article for original applicants (emphasis supplied)

This grant of discretion to an administrative agency without any objective criteria or guidelines does raise a substantial federal question. The plaintiff is entitled to present that question to a three-judge court convened pursuant to 28 U.S.C. S 2284. The Attorney General of Colorado is not a proper party to this action and the motion to dismiss should be granted as to him.

Upon the foregoing, it is

ORDERED that the complaint and amended complaint are dismissed as to the Attorney General of Colorado, J.D. MacFarlane; that the motion to dismiss as to the Real Estate Commission of the State of Colorado is denied and a three-judge court will be convened for the consideration of the injunction requested by the plaintiff.

DATED at Denver, Colorado, this 19th day of February, 1976.

BY THE COURT:

Richard P. Matsch, Judge  
United States District Court

**APPENDIX C**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Civil Action No. 75 M 297**

H. GORDON HOWARD, *Plaintiff Pro Se*

VS

THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO, *Defendant*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED  
STATES FROM THE FINAL ORDER OF DISMISSAL BY THE  
THREE JUDGE PANEL OF THE DISTRICT COURT FOR THE  
DISTRICT OF COLORADO**

**Notice of Appeal**

Notice is hereby given that H. Gordon Howard, Plaintiff, Pro Se, in the above numbered and captioned action, hereby appeals to The Supreme Court of The United States from the memorandum and final order of dismissal by the United States District Court for Colorado, Three Judge Panel, which order was dated and entered in the action on September 28, 1976. This appeal is based on the fact that the order of dismissal of the said action was, and is, an arbitrary, unreasonable, and capricious abuse of judicial discretion, denying to the Plaintiff, who is a United State Citizen, his Constitutional rights as guaranteed by the 14th Amendment to the United States Constitution, without allowing him a hearing on said Constitutional guarantees.

This said appeal is a direct appeal from the decision of a Three-Judge Panel pursuant to Title 28, Section 1253 of the United States Code Annotated.

H. GORDON HOWARD  
*Appellant, PRO SE,*  
2470 South Ivanhoe Place  
Holly Hills  
Denver, Colorado 80222

**Certificate of Mailing:**

I, the undersigned, hereby certify that on Oct. 18, 1976, I did mail by first class mail in a properly sealed, addressed, and stamped envelope, deposited in the U.S. Mails at Denver, Colorado, a copy of the within notice of appeal, directed to Bruce M. Douglas, Atty. for the defendant, at 110 State Services Building, 1525 Sherman Street, Denver, Colorado.

H. GORDON HOWARD

**APPENDIX D**

**IN THE SUPREME COURT OF THE STATE OF COLORADO**

**No. C-646**

**January**

**TERM 1975**

**H. GORDON HOWARD, *Petitioner***

**VS.**

**THE REAL ESTATE COMMISSION  
OF THE STATE OF COLORADO, *Respondent***

**ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.**

**After review of the record, the briefs and the opinion of the Court of Appeals,**

**IT IS ORDERED by this court that said petition be, and the same hereby is, denied.**

**March 3, 1975**

**By the Supreme Court  
Sitting En Banc**